of his choice. The protection under clause 3 is the relevant one here. Clause 3 of Article 5 of the Constitution reads:

"(3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice."

It can be observed from the records that the respondent was informed of the grounds of his arrest and detention. It was also not disputed that the respondent did in fact consult a legal practitioner who made representations on his behalf. In other words, he was afforded the opportunity of being heard.

In our judgment, an enquiry by the Deputy Minister before he makes an order under section 2(ii) of the Enactment is optional and for the purpose only of satisfying himself that there are reasonable grounds for believing that the respondent should have his residence restricted. The respondent is not entitled as of right to an enquiry before an order under section 2(ii) of the Enactment is issued against him. It is also clear that in this particular case the requirements of clause 3 of Article 5 of the Constitution have been complied with.

As regards the cross-appeal, it is to be observed that the object of the Enactment is to maintain public order. The Enactment is a pre-Merdeka law which has proven its usefulness. On the point raised the learned judge said in his judgment:

"The Enactment indeed gives drastic powers to the executive to exile any person who wears a grey tie because the executive does not like him to wear a grey tie. It was, however, argued that as the allegation against the plaintiff is that of cheating under the Penal Code, he should be prosecuted in the criminal courts and therefore the Enactment should not be used against him. It is not for the court to fathom the thoughts of the Minister. The Enactment does give him the power to restrict the plaintiff on the grounds stated because the ground stated is reasonable, that is to say, a cheat should not be allowed to cheat innocent people. It would not be a reasonable ground, if the Minister had stated that the order was made because the plaintiff wore a grey tie. I accordingly hold that the grounds for restricted residence in the instant case are within the scope, ambit and purview of the Enactment."

With respect, we agree and accordingly dismissed the cross-appeal.

Appeal allowed; cross-appeal dismissed.

Solicitors: *Karpal Singh & Co.*

KEDAH KELANG PAPAN SDN. BHD. v. HANSOL SDN. BHD. (TEKNIBINA ADVISORY SERVICES SDN. BHD., GARNISHEE)

[A.C.J. (Lim Beng Choon J.) December 28, 1987]

[Alor Setar – Civil Suit No. 24-17-87]

Civil Procedure – Garnishee order – Money earned by judgment debtor for work done retained by garnishee as retention money – Whether money retained a debt due and owing by garnishee to judgment debtor and capable of being garnished by judgment creditor – R.H.C. 1980, O.49 r.1.

The judgment creditor was the plaintiff in a civil suit and the judgment debtor was the defendant in that case. After obtaining judgment in his favour, the judgment creditor applied to court to claim from the garnishee certain sums of money totalling $101,716.51 which the garnishee owed the judgment debtor under a building contract.

The issue was whether the sum of $101,716.51 could be attached under Order 49 rule 1 of the Rules of the High Court 1980. The Senior Assistant Registrar made the garnishment order absolute. The garnishee appealed.

Held, dismissing the appeal: (1) no garnishee order can be made unless the person, at the time when the order is made, is indebted to the judgment debtor. It is not enough to show that it is very probable that there soon will be a debt;

(2) a debt, legal or equitable, can be attached whether it be a debt owing or accruing. A debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation. The words "or accruing" in Order 49 rule 1 are intended to apply to cases in which there are debts owed at the present time but payable in the future. An accruing debt, therefore, is a debt not yet actually payable but a debt which is represented by an existing obligation;

(3) in the instant case, the sum of $65,801.98 retained by the garnishee was in effect a fixed sum which had already been earned by the judgment debtor. In other words, the retention money was carved out of the contract price of that part of the work which had already been done by the judgment debtor and thereby they had earned the money arising from the carrying out of such work. There could not, therefore, be any dispute that the sum retained represented a debt due from the garnishee to the judgment debtor, albeit payable after the expiry of the defective liability period;

(4) in garnishing proceedings, the law is concerned only with any cross-claim or cross-debt existing at the date of the attachment and not a cross-claim or cross-debt that may come into existence some time in the future, however likely it may arise. In the instant case, whatever cross-claims the garnishee may have against the judgment debtor in respect of defective works which may arise subsequently did not represent a cross-claim or cross debt existing at the date of the attachment;

(5) the learned judge, accordingly, held that the sum of $65,801.98 retained by the garnishee as retention money could rightfully be attached;

(6) as for the sum of $454,491.22 already released by the garnishee to the judgment debtor upon their production of a bank guarantee, the learned judge held that that amount could be attached under the garnishee order which can only operate on debts due and owing by the garnishee to the judgment debtor and not in a transaction involving a third person who is not a party to the proceeding;

(7) the order of the Senior Assistant Registrar was, accordingly, affirmed by the learned judge.

Cases referred to:

(1) *Tapp* v. *Jones (Pooley, Garnishee)* (1874-1875) L.R. 10 Q.B. 591.
(2) *Webb* v. *Stenton & Others, Garnishees* (1882-1883) 11 Q.B.D. 518.
(3) *O'Driscoll & Anor.* v. *Manchester Insurance Committee* [1915] 3 K.B. 499.
(4) *Hall & Anor.* v. *Pritchett (The Corporation of Huddersfield, Garnishees)* (1877-78) 3 Q.B.D. 215.
(5) *Dunlop & Ranken Ltd.* v. *Hendall Steel Structures Ltd. (Pitchers Ltd., Garnishees)* [1957] 3 All E.R. 344.

CIVIL SUIT.

Koh Teck Wah for the garnishee.

Poh Ah Loy @ Poh Ah Ley for the judgment creditor.

Cur. Adv. Vult.

Lim Beng Choon J.: On August 9, 1987, the Senior Assistant Registrar of this court ("the SAR") made absolute a garnishment order nisi against the garnishee, directing the garnishee to satisfy the judgment recovered by the judgment creditor against the judgment debtor, out of certain sums of money which were alleged to be owing or accruing from the garnishee to the judgment debtor. The garnishee was also directed to appear before the said SAR on September 2, 1987 for the purpose of settling the amount to be garnished. The garnishee, being dissatisfied with the order of the SAR, now appeals to me to set aside the said order.

In order to appreciate the issue raised in this appeal, it is necessary to give a brief summary of the events leading to this appeal. On February 17, 1987, the judgment creditor instituted an action as plaintiffs under Civil Suit No. 24-17-87 of the High Court, Alor Setar against the judgment debtor (the defendants in that action). In that civil suit, the plaintiffs claimed that the defendants were indebted to them in the sum of $66,937.70, being the amount owed by the defendants for goods sold and delivered by the plaintiffs, and particulars of the transactions had been rendered to the defendants. Despite numerous requests for payment made by the plaintiffs, including a notice of demand in writing dated January 12, 1987 issued by the plaintiffs' solicitors to the defendants demanding for the payment of the amount owed to them, the defendants failed to settle the said amount. The plaintiffs, therefore, prayed for judgment against the defendants for the aforesaid sum including interest and costs. As the defendants in that suit failed to enter appearance, the plaintiffs obtained a certificate of non-appearance from this court on February 18, 1987. In the result, the plaintiffs entered judgment in default of appearance on the same day. The judgment was duly drawn up and extracted on March 4, 1987 whereby the defendants were directed to pay the plaintiffs a sum of $66,937.70 together with interest at the rate of 8% per annum as from January 12, 1987 till the date of realization and costs. As the judgment sum remained unsatisfied, the judgment creditor made a number of *ex parte* applications under Order 49 rule 2 directing certain purported debtors, who were said to be indebted to the judgment debtor, to show cause as to why the amount of the debts owed by those purported debtors should not be garnished. For some reason or other, no further steps were taken by the judgment creditor to pursue the matter against those purported debtors. On July 5, 1987, the judgment creditor, in desperation to recover the judgment sum, made another *ex parte* application for and obtained a garnishment order nisi ordering the garnishee to appear and show cause. In response to the order nisi, one En. Adnan Mahidin, the chairman of the garnishee company, filed in an affidavit on July 22, 1987 by which it was contended that there was no money or debt due and owing from the garnishee to the judgment debtor. Despite this contention, the SAR, after hearing the respective counsel for the garnishee and the judgment creditor, made absolute the order nisi as stated above.

The sole issue arising from this appeal is whether the sum of $101,716.51, already earned by the judgment debtor in respect of the works which they had carried out under the contract for the construction of the Jitra/Alor Setar Highway Project, and which sum was retained by the garnishee as retention money for the prupose of compensating the latter for defects in the works carried out by the judgment creditor, could be garnished under Order 49 rule 1 of the Rules of the High Court 1980.

It is to be noted that the words appearing in Order 49 rule 1 that are crucial in determining the issue in this appeal are:

"... the amount of any debt due or accruing due to the judgment debtor from the garnishee."

The judicial definition of the crucial words has been propounded in numerous English cases, but, nevertheless, it has been stated that it is very often difficult to distinguish between a case where a debt has not accrued and there is no actual debt, and a case where there is a debt *debitum in praesenti solvendum in futuro*. However that may be, the matter was dealt with by Blackburn J. in *Tapp* v. *Jones; Pooley, Garnishee*[1]. There, the plaintiff obtained judgment in an action against the defendant on November 21, 1872, and a sum of £590 remained due upon the judgment. Sometime in September 1874, one Pooley entered into an agreement with the defendant under which Pooley was bound to pay to the defendant a sum of money by monthly instalments of £10 each. On December 22, 1874, one instalment being due, an order was made by a master under section 61 of the Common Law Procedure Act 1854 attaching all debts owing or accruing from Pooley, who was by then made a garnishee, to answer the judgment debt. On December 31, 1874, another order was made by a master to the effect that the garnishee should pay to the plaintiff the debt then due to the defendant, and also the accruing debts, as they became due. Writs of execution were issued in respect of the two instalments. The garnishee thereupon made an application to set aside the executions, and to set aside or alter the order of payment under which they were levied. The counsel for the garnishee in his submission, firstly, contended that although the said section 61 authorized an order attaching "debts owing or accruing", there must be a limit as regards to payment and the limit was to pay the debt that was actually due and payable. It must follow, therefore, that the master's order directing the garnishee to pay to the plaintiff, not only the debt then due and payable to the defendant, but also the accruing debts as they became due, was outside the provisions of the said section 61.

Secondly, it was contended that a right of set-off might accrue to the garnishee as against the judgment debtor between the date of the attachment and the debt becoming payable. An order for payment made in advance would, therefore, deprive him of this right. Blackburn J. in rejecting the first contention said at pp. 592 and 593:

"It is evident that the legislature had in view both present debt and future debt, *debita in praesenti, solvenda in futuro,* for it speaks in the earlier part of the section of 'debts owing and accruing'. Therefore it is clear that the attachment was good. But in the latter part of the section the language is altered. It speaks merely of 'the debt due'. Now it is quite clear that the garnishee cannot be bound to pay his debt before it is due; so that we must read 'the debt due' as meaning either the debt when due, or the debt then due. If the former reading be the correct one, then the present order was quite right; if the latter, then it was premature. I have come to the conclusion that the true construction is that there is power to make an order against the garnishee for payment of his debts as and when they become payable, instead of making a fresh order as each falls due."

As regards to the second contention, the learned judge said (p. 593):

"I agree that no greater right is given to the creditor than the debtor had. It is obviously just that if a cross-debt was due to the garnishee *at the date of the attachment* there should be a right of set-off in his favour, and I should strive hard to give effect to it if I could, though there would be difficulties in the way. But Mr. Williams goes further and maintains *the right to set off debts accruing after the attachment.* For this I see no ground. On the attachment the thing is *absolutely fixed; and there is no clause of mutual credit or set-off."* (Emphasis is mine)

Eight years later, the Court of Appeal had occasion to determine the same issue in the case of *Webb* v. *Stenton And Others*[2]. An instructive proposition was propounded by Lindley L.J. when he said at pp. 526-528:

"I should say, apart from any authority, that a debt legal or equitable can be attached whether it be a debt owing or accruing; but it must be a debt, and a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation, *debitum in praesenti, solvendum in futuro.* An accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation."

And the learned judge went on to say:

"The result seems to me to be this; you may attach all debts, whether equitable or legal; but only debts can be attached;"

Another interesting case is *O'Driscoll & Anor.* v. *Manchester Insurance Committee*[3]. In that case, the insurance committee, acting under the National Insurance Act 1911 and the regulations made thereunder, entered into agreements with the panel doctors of their district by which the whole amounts received by the committee from the National Insurance Commissioners were to be pooled and distributed among the panel doctors in accordance with a scale of fees; the total

amount available for medical benefits so received by the committee was to be the limit of the liability to the panel doctors, and if the total pool was insufficient to meet all the proper charges of the panel doctors in accordance with the scale, there was to be a pro rata reduction for each doctor. On the other hand, if it should be in excess of the amount required, the balance was to be distributed among the panel doctors. In the premises, it was held that where a panel doctor *had done work under his agreement* with the insurance committee and the committee had received funds in respect of medical benefits from the National Insurance Commissioners, there was a debt owing or accruing from the insurance committee to the panel doctor which might be attached, notwithstanding as a matter of conclusion, the exact share payable to him might not yet have been ascertained. Another case which I would like to refer to is the case of *Hall & Anor.* v. *Pritchett (The Corporation of Huddersfield, Garnishees).*[4] There, it was held that if at the date of attachment, the judgment debtor had not yet performed the work which would entitle him to be paid, there would not be "a debt due, owing and accruing" to the judgment debtor.

From the principles enunciated in the aforesaid cases, the following propositions can safely be distilled:

(1) No garnishee order can be made unless some person, at the time when the order is made, is indebted to the judgment debtor. If there be a debt *in presenti,* of course an order can be made to attach the debt.

(2) If there is not a debt payable *in presenti,* but there is a debt in existence, *debitum in presenti,* but payable in the future, such an order can still be made with regard to the debt whether legal or equitable.

(3) The words "or accruing" are intended to apply to those cases in which there are *debita in praesenti, solvenda in futuro* (debts owed at present time payable in the future). It is not enough to show that it is very probable that there soon will be a debt; it must be shown that there is a debt.

(4) *A debitum in presenti* not yet actually payable is nevertheless a debt which is *represented by an existing obligation.*

Before I proceed to deal with the issue in the present case, I must mention that it is clear that the garnishee, in challenging the right of the judgment creditor to obtain a garnishee order from this court, is relying on certain terms of the contract executed between the garnishee and the judgment debtor to support its contention that there is no debt due by it to the judgment debtor. Despite its reliance on the contract, the garnishee did not deem it fit to produce at least the relevant parts of the contract to assist this court. In such a situation this court can only rely on the contents of the affidavit deposed by En. Adnan Mahidin, the chairman of the garnishee company, dated July 22, 1987 (enc. 21). The salient assertions deposed by the said chairman may be paraphrased as follows:

(1) The works under the contract were divided into two packages *viz.* package 2 and package 4 and a sum of $101,716.51 was retained by the garnishee as retention money until the expiry of one year from the date of the issue of the certificate of completion of the works to ensure the garnishee could be adequately compensated for any defects arising out of the judgment debtor's work.

(2) The judgment debtor has completed the work in respect of package 2 and it has been paid in full. Although the retention money is not due and payable until June 17, 1988 nevertheless it was released to the judgment debtor on May 26, 1987 upon a production of a bank guarantee from the judgment debtor.

(3) As for package 4, there is still a balance of $15,000.00 from the contract sum which has to be paid to the judgment debtor and this amount is due and payable upon the issuance of the certificate of completion of the works and the said certificate has not been issued as at to date.

The deponent then went on to say "there is no money or debt due and owing from the garnishee to the judgment debtor."

From the affidavit of En. Adnan Mahidin, it is clear that a sum of $65,801.98 has been retained by the garnishee in respect of so much of the work under package 4 (see exhibit "A1" annexed to the said affidavit) which has been done to the judgment debtor. That sum has been earned by the judgment debtor when he has done that much of the work in respect of package 4 and payment thereof has been made to it. It follows, therefore, the money that has been retained is money that still belongs to the judgment debtor. Accepting

the fact that the garnishee has a right under the term of the contract entered into by the garnishee and the judgment debtor to retain the said sum as retention money, nevertheless it is the judgment debtor's own hard-earned money that has been retained and not money which he has yet to be earned as in the case of *Hall* v. *Pritchett.*[4] In such a situation, it is beyond dispute that the holding back of the said sum, albeit as retention money, must constitute a debt due from the garnishee to the judgment debtor although it is payable *in futuro.* In short, it is a debt *debitum in presenti solvendum in futuro.* It may be true, as stated by En. Adnan Mahidin in his affidavit, that the retention money is retained in the power of the garnishee as a fund to be drawn upon should the occasion arise to rectify defects in the work carried out by the judgment debtor. But in garnishee proceedings the law would only acknowledge two kinds of debts, an existing debt payable *in presenti* or an existing debt payable *in futuro.* The law does not recognize a debt that probably will arise in the future or however likely it may arise (see *Webb* v. *Stenton*[2] at p. 315). Putting the case of the garnishee at its highest, it has only shown to this court that within what is usually known in most, if not all, building and engineering contracts as the defective liability period, the garnishee may discover some defective works which would enable it to make a cross-claim against the judgment debtor. But in garnishing proceedings, the law is concerned only with any cross-claim or cross-debt existing at the date of the attachment and not a cross-claim or cross-debt that may come into existence some time in the future (see the speech of Blackburn J. in *Tapp* v. *Jones*[1] at p. 593). For the reasons as stated above, I hold that the sum of $65,801.98 retained by the garnishee as retention money can rightfully be attached.

As regards to the retention money in the sum of $45,491.22 under package 2, it has been asserted by En. Adnan Mahidin's affidavit that that sum had already been released to the judgment debtor on May 26, 1987 upon his production of a bank guarantee. In the circumstances, that amount cannot be attached, as a garnishee order can only operate on debt due and owing by the garnishee to the judgment debtor. It cannot operate in a transaction involving a third person who is not a party to the proceeding.

Before I depart, I would like to say a few words with regard to the case of *Dunlop & Ranken Ltd.* v. *Hendall Steel Structures Ltd. (Pitchers Ltd., Garnishees)*[5], which learned counsel for the garnishee relied on strongly to support his submission that until and unless the architect in the present project has issued a certificate of payment there was no money due from the garnishee to the judgment debtor. With due respect, I think the judgment in that case is distinguishable. In that case, the appeal was against an order of the district registrar of the lower court making absolute a garnishee order nisi which had been obtained by Dunlop & Ranken Ltd., the judgment creditors, against Hendall Steel Structures Ltd., the judgment debtors, in respect of a sum of money which was said to have been owed by Pitchers Ltd., the garnishees, to the judgment debtors. In arriving at their decisions, the learned judges had to consider three important clauses in the R.I.B.A. form of contract entered into between the building owner and the main contractor who, in that case, was the garnishee. The first of the three clauses was clause 24 which provided:

"(a) At the period of interim certificates named in the appendix to these conditions *interim valuations shall be made whenever the architect considers them necessary,* and the contractor shall subject to clause 21 of these conditions be entitled to receive within ten days of his written application for the same a certificate from the architect stating the amount due to the contractor from the employer, and shall on presenting any such certificate to the employer be entitled to payment therefor within the period named in the appendix." (Emphasis is mine)

The next important clause was clause 21 which further provided:

"(b) The sums directed by the architect to be paid to nominated sub-contractors for work, materials or goods comprised in the sub-contract shall be paid by the contractor within fourteen days of receiving from the architect a certificate *including the value of such work, materials or goods* less only (i) any retention money which the contractor may be entitled to deduct, and (ii) a cash discount of 2½% per cent." (Emphasis is mine)

The aforesaid two clauses were deemed to have been included in the casual agreement made in the form of purchase orders issued by the main contractor, the garnishees, and the subcontractor, the judgment debtors.

The third important clause appeared in the purchase order for steelwork issued by the garnishees to the judgment debtors which clause was in effect a fluctuation clause and which read as follows:

"Please:– (a) Submit your invoice in duplicate. (b) Quote this order number on your invoice. (c) *Advise both us and the architect immediately of any increase or decrease in*

cost of labour and materials which may be adjustable under the terms of the contract." (Emphasis is mine)

In their consideration of the two clauses and the clause inserted in the purchase order for the steelwork as adumbrated above, the learned judges arrived at the following conclusions:

(1) In view of the fluctuation clause, it was clear that the contract price which was quoted in the sub-contract was not a firm price but depended on the rise and fall of prices both in the materials and the labour market. (See the speech of Lord Goddard C.J. at p. 348.)

(2) Any interim payment would not accrue until the architect had made a valuation of the work done and materials supplied by the sub-contractor pursuant to the said clause 24.

(3) The architect must issue a certificate to affirm the value of such work, and the materials and goods carried out and supplied, as the case may be, by the contractor.

In arriving at their conclusions, it is clear that the learned judges were of the view that, firstly, any claim made by the sub-contractor for work done and materials and goods supplied could not be entertained until the architect had made *a valuation* of such works and materials and goods purported to have been supplied by the sub-contractor and only when the valuation had been carried out no monetary value could be ascribed to the work purported to have been done and the materials and goods purported to have been supplied by the sub-contractor; hence no money was due and payable to the sub-contractor until a valuation had been carried out by the architect who would thereupon issue a certificate of payment. It follows therefore without the architect's valuation the claim of the contractor was not only unascertainable yet but in effect it was unascertainable at all at least contractually. In the result, there was therefore no money due from the garnishees to the judgment debtors. In support of this proposition, certain passages from the learned judges are relevant and I shall, firstly, quote a passage from the speech of Lord Goddard C.J. at p. 348:

"I think this is not a case of *debitum in praesenti solvendum in futuro.* It is not a mere case of putting off payment; it is that the judgment debtors have not a right to be paid, and, therefore, that there is no debt, until there is a certificate certifying the amount which is to be paid for this steelwork which was the subject of the order which was given by the garnishees to the judgment debtors."

Another passage which is equally important can be found in the judgment of Havers J. who said at p. 349:

"It is clear therefore, that, both parties contemplated that that specified sum was not a fixed sum but might fluctuate up or down in accordance with the provisions for fluctuation in the contract."

His Lordship then went on to say:

"The real question, therefore, arises as to the true interpretation of those words 'in accordance with the certificates'. I share the view of my brethren that those words really mean 'if and when a certificate is given'. If that is the true construction, it is clear that there was no debt owing or accruing at the time the garnishee order nisi was made."

Now, the facts in the instant appeal are clearly different, in that the retention money was in effect a fixed sum which has already been earned by the judgment debtor. In other words, the retention money was carved out of the contract price of that part of the work which had already been done by the sub-contractor, and, thereby he had earned the money arising from the carrying out of such work. There cannot, therefore, be any dispute that the garnishee, in retaining the fixed sum of money belonging to the judgment debtor, it is a debt due from the garnishee to the judgment debtor, albeit payable after the expiry of the defective liability period.

It is also interesting to note that the views expressed by the learned judges in the *Dunlop & Ranken* case were criticized by the learned author of *Hudsons' Building and Engineering Contracts* 9th Ed. at p. 575 where the learned author said:

"In *Tapp* v. *Jones*, however, attachment was permitted of a debt repayable by instalments not yet due at the time of attachment, and this principle was approved in the judgments in the *O'Driscoll* case. Applying this reasoning to building cases, it would seem strongly arguable that where work has been done but the price is not yet payable by reason of the necessary certificate not having been issued, or because the date of payment has not yet arrived (as in the case of retention moneys) that there is an existing debt though not yet payable. Thus Lord Blackburn, in the case involving the construction of a guarantee for the completion of building work, said of a clause in the usual form of payment upon a certificate of completion: 'Upon the completion of the building there would be a debt due to Thick, but not payable until Griffith had certified the fact of completion'. This view appears to have been accepted in Canada in *Sandy* v. *Yukon Construction Co., Ltd.* but rejected in the *Dunlop & Ranken* and *Grant Plant Hire*

cases. There is much to commend the view of the Canadian court, and it is suggested that the matter requires reconsideration by the English courts."

In Max Abrahamson's book on *Engineering Law and I.C.E. Contracts* 4th Ed. at p. 271, the learned author said quite unequivocally that:

"The essential ingredient was that as retention money the money claimed was a quantified sum and was undisputably due."

To my mind, the principles discussed in the earlier part of this judgment are encapsulated in this short sentence.

In the circumstances, the order of the SAR is affirmed and this appeal brought by the garnishee is dismissed with costs.

Appeal dismissed.

Solicitors: *Nordin Torji & Yussof Ahmad; Lim Huck Aik & Co.*

PERSATUAN ALIRAN KESEDARAN NEGARA v. MINISTER OF HOME AFFAIRS

[A.C.J. (Harun J.) December 19, 1987]

[Kuala Lumpur – Civil Appeal No. 32-53-87]

Administrative Law – Certiorari and mandamus – Reform movement a registered society – Application for permit to publish magazine in Bahasa – Rejection – Absolute discretion whether subject to judicial review – Printing Presses and Publications Act 1984, ss. 6(2) & 12(2).

The applicant is a reform movement registered under the Societies Act 1966. Its aims include the publication and distribution of articles, pamphlets, journals, periodicals and books. Amongst its publications is the monthly magazine in English, the *Aliran Monthly*, whose permit has been renewed annually since 1984. On November 1986, it applied for a permit to publish a fortnightly magazine in Bahasa Malaysia to be called "Seruan Aliran". The application was rejected on April 27, 1987. The Minister took into consideration several matters in exercising his discretion under section 12(2) of the Printing Presses and Publications Act 1984. The applicant instituted the present proceedings for orders of certiorari and mandamus to be issued against the Minister.

Held: (1) the reasons given by the Minister for refusing the application were not valid. Although the discretion exercised by the Minister was absolute, it was not unfettered, and therefore the exercise of the discretion was subject to judicial review;

(2) the granting of a permit to print and publish a magazine under the 1984 Act should be made as a matter of course provided all the requirements for such a permit have been complied with. At the granting of permit stage the consideration for the Minister's discretion is limited to protecting the public interest or national interest in respect of public order, morality and security as shown in sections 4 and 7 of the 1984 Act;

(3) the discretion to refuse to grant a permit could not be exercised in anticipation that the applicant was likely to publish material which might offend against any law;

(4) in this case the Minister had no good reasons in refusing the application for a permit and accordingly the orders prayed for must be granted with costs.

[*Editorial Note:* The respondent has appealed to the Supreme Court against the decision *vide* Supreme Court Civil Appeal No. 408 of 1987.]

APPLICATION.

T. Thomas (*Ms Chua See Hua* with him) for the applicant.

K.N. Segara (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Harun J.: The applicant (Aliran) is a reform movement dedicated to justice, freedom and solidarity. It has been a registered society under the Societies Act 1966 since January 1977. In pursuance of its aims, Aliran, *inter alia*, is to publish and distribute articles, pamphlets, journals, periodicals and books.

On April 3, 1979, Aliran applied for a permit to publish a newspaper called "Aliran" to be published quarterly in English and Bahasa Malaysia. On January 28, 1980, a permit was granted in both languages.

On September 1983, Aliran applied for a permit to publish a monthly magazine in English called "Aliran Monthly". A permit was granted on December 27, 1983 to publish in both English and Bahasa Malaysia although the application was specifically for English only. These permits have been renewed annually since 1984.

On November 13, 1983, Aliran applied for a permit to publish a monthly magazine in Bahasa Malaysia to be called "Seruan Aliran". This application was rejected on March 17, 1984. Aliran appealed to the Yang di-Pertuan Agong under section 7(6) of the Printing Presses Act 1948 but there has been no decision on this appeal.